APPEAL NO. 93244

On February 23, 1993, a contested case hearing was held in (city), Texas, with Patrice Fleming-Squirewell presiding as the hearing officer. The hearing officer determined that the injury that the appellant (claimant herein) sustained at work on (date of injury), was due to the claimant's wilful intent and unlawful attempt to injure another employee, as well as the claimant's personal animosity or hostility toward the other employee that was unrelated to the employment, and was, therefore, not compensable under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The hearing officer further determined that since the claimant did not sustain a compensable injury, he could not have any disability as defined by the 1989 Act. The claimant contends that the evidence shows that he sustained a compensable injury, and further contends that the carrier failed to raise sufficient evidence to put into issue exceptions from liability under Article 8308-3.02(2) and (4). The respondent (carrier herein) responds that there is sufficient evidence to support the hearing officer's decision.

DECISION

The decision of the hearing officer is affirmed.

The employer operates a wholesale grocery supply warehouse. In July 1991, the claimant worked for the employer in the sanitation department. He took damaged stock to the salvage department where (Mr. V) worked. The claimant testified that he and Mr. V were good friends, but that some time prior to (date of injury), Mr. V tried to choke him while at work. The claimant didn't say what caused that incident. The claimant denied calling Mr. V a homosexual, denied giving Mr. V money to perform oral sex on him, and denied picking on Mr. V. He testified that prior to July 26th, there was no animosity or hostility between him and Mr. V. The claimant also said that he always got along with his coworkers; however, he indicated that some time prior to (date of injury), another coworker tried to stab him in the back because the coworker wanted the machine the claimant was using. The claimant testified that on July 26th, he was in the warehouse riding on a "Barrett" machine pulling an empty dumpster when Mr. V ran into his machine with a forklift around Aisle 48 or Aisle 49. The claimant said that he was knocked off his machine, fell to the concrete floor, hit his head and back on an iron pillar, and was rendered unconscious for 15 or 20 seconds. The claimant stated that his back began hurting right after he was knocked off his machine. The claimant said there were no witnesses to the collision and that Mr. V left the scene without helping him up.

The claimant further testified that when he came to he got on his machine and drove it over to Aisle 75 where Mr. V was and asked Mr. V why he did not assist him or find out if he was hurt. He said that Mr. V told him to get out of his way, cussed at him, and then pulled out a knife and stabbed him. The claimant said he fell to the floor. The claimant could not recall if there were any witnesses to Mr. V cutting him with a knife. He said about two or three minutes elapsed between the collision with the forklift and the knife incident. The claimant denied hitting Mr. V or knocking him down. The claimant said the next thing

he remembers is being in the shipping department telling his immediate supervisor, (Mr. X) about the incident. He was then taken by ambulance to a hospital emergency room. He said he complained about his back at the hospital and that he was treated for his back, head, and cut at the hospital. He said he thought that he went to (Dr. K) the next day for back and neck problems. He said Dr. K has treated him for his back and neck problems for about six months and released him to return to work in February 1992. At least three times during the hearing the claimant denied having worked after (date of injury), but finally acknowledged that he had worked for several weeks for another company.

The hospital emergency room report of (date of injury), showed that the claimant was treated for a laceration to his right thigh and that he denied injury or pain elsewhere. Dr. K's initial medical report is dated August 5, 1991. His initial diagnoses were 1. traumatic deep laceration anterior distal thigh right; 2. traumatic contusion lumbar and lumbo-sacral spines; 3. traumatic cervical strain; 4. traumatic contusion distal forearm left, and left wrist; and 5. traumatic incised wound, superficial, anterior chest wall, left. X-rays revealed no fractures of the cervical spine, lumbar spine, left wrist, right distal femur, left hand or left rib cage. Dr. K prescribed pain medication and physical therapy and stated that the claimant was "temporarily disabled at least for 8 to 10 weeks" and that the claimant should not resume any form of employment with the employer or any other companies. Dr. K noted that the claimant said that there was no argument or exchange of conversation between him and the coworker who cut him with a knife.

In a transcribed recorded statement taken on August 7, 1991, Mr. V stated that on (date of injury), he was using a forklift to stock items; that the claimant followed him in a "cart" for seven or eight aisles; and that when he stopped and got off his forklift in Aisle 42 or 44 to put boxes up, the claimant got off the cart and started telling him "all kinds of stuff that he was gonna do to me." Mr. V further stated that he told the claimant to leave him alone, that he did not want any trouble, and that he was working. He said that he tried to ignore the claimant, but that the claimant told him that he was going to "mess my face up and, uh, to the point where my momma won't recognize me," and told him that "I got you back here and we're all alone and there's nobody that can help you." He said that the claimant grabbed him, hit him on the side of the head, and knocked him down. He got up, and the claimant knocked him down again. He said that the only way he knew to get the claimant off of him was to scare him so when he was on the floor the second time he reached up with his box cutter, which he also called a razor blade, stretched out his hand and cut the claimant on the leg.

Mr. V denied taking a "swing" at the claimant before the claimant "swung" at him. Mr. V said that he then went to (Mr. D), his supervisor, and reported the incident. Mr. V related that about two months before the incident on July 26th, he and the claimant had started joking and fooling around, but that this escalated and got serious so he told the claimant to stop bothering him. Although he said he tried to avoid the claimant, the claimant

kept bothering him. When asked whether their arguing was something related to work, Mr. V replied "No, it was, it was something else that he wanted me to do and, you know, I told him that, you know, that wasn't my idea of whatever it was." Mr. V further stated that "it didn't have nothing to do with the work." Mr. V said he was unemployed at the time he gave his statement.

(Mr. J) works for the employer and said he witnessed an incident between the claimant and Mr. V on (date of injury) in Aisle 44. He described what he saw as follows: Mr. V was using a forklift to take items off of a pallet. The claimant was on a "pallet jack" and turned the corner into the aisle and ran into Mr. V's forklift. The claimant did not fall off the pallet jack. The claimant told Mr. V to move, and Mr. V told the claimant to go around him. The claimant then told Mr. V that he was going to "whip his ass and he owed him an ass whipping." The claimant pulled up twice to the forklift. Mr. V got off the forklift and the claimant and Mr. V were standing face-to-face. Mr. V had a box cutter in his hand, which Mr. J also described as a "blade." The claimant then hit Mr. V in the jaw with his fist and knocked him under a rack. The claimant then ran up to Mr. V, and Mr. V, who was still on the floor, swung the box cutter at the claimant cutting the claimant's leg. The claimant then hollered at Mr. J to call the supervisor.

Mr. J further testified that the claimant did not complain to Mr. V about failing to help him a few minutes earlier, and that the claimant did not refer to any collision between the forklift and the pallet jack which the claimant had testified had happened a few minutes earlier. Mr. J also said that it was the claimant who ran his pallet jack into Mr. V's forklift; that the claimant was the aggressor in the altercation; and that Mr. V was just working, was not trying to pick a fight, and was trying to avoid a fight. Mr. J went and got a supervisor, and when he and the supervisor returned, the claimant was standing up. Mr. J said that the entire incident happened in the same area of Aisle 44 and that he was 15 to 20 feet from the claimant and Mr. V, although at one point he got to within 4 or 5 feet of the claimant and told the claimant to leave Mr. V alone. Mr. J described the claimant as hard to get along with and that the claimant cursed coworkers when they got in his way. He said that Mr. V was friendly, minded his own business, and was not the type of person to pick a fight. Mr. J said that prior to the incident on July 26th, there was a conflict going on between the claimant and Mr. V, but he did not know what it was about.

On (date of injury), Mr. D was the supervisor of the sanitation and salvage departments and was training Mr. X to be the supervisor of the sanitation department. Mr. D testified as follows: the claimant was hard to get along with, had a bad attitude, and coworkers did not want to work with him and complained about him. Everybody liked Mr. V and Mr. V never bothered anyone. In April or May 1991, Mr. V complained to him about the claimant "interfering" with him and embarrassing him in the lunch room during breaks. On one occasion, Mr. V complained that, in front of coworkers in the lunch room, the claimant had given him $5.00 to perform oral sex on the claimant. The next day, Mr. D told

the claimant to keep away from Mr. V and not to go into the salvage area where Mr. V worked. Mr. D said he did not see the incident on July 26th, but that after it happened, Mr. V came to his office and told him that the claimant had bumped his forklift and that he had cut the claimant because the claimant had hit him and knocked him down while he was putting up products. Mr. D went to the shipping office where the claimant had been taken after the incident and helped bandage his leg. He said that the claimant did not complain about his head, neck, back, or arms. Mr. D testified that the fight between the claimant and Mr. V had to do with the claimant accusing Mr. V of being homosexual, that the fight was due to personal reasons, and that there was no work-related reason for the fight. He said the fight happened on Aisle 48 or 49.

Mr. X said in a transcribed recorded statement that he was the claimant's immediate supervisor on (date of injury), and that on July 25th he instructed the claimant to quit horseplaying on the job. After he was informed of the altercation between the claimant and Mr. V on July 26th, he talked to Mr. V who told him that the claimant had been harassing him, running his "motor" into the forklift, and threatening to beat him up. Mr. X also said that Mr. V related that he got down off the forklift and pulled a box cutter, that the claimant started to leave him alone, that the claimant then decided to come back and hit him and knock him into the rack, and that the claimant came toward him and struck him again.

The parties agreed that the issues to be decided at the hearing were: 1. whether the carrier is relieved of liability for injuries sustained by the claimant as a result of an assault at work on (date of injury), under Article 8308-3.02 of the 1989 Act; and 2. whether the claimant sustained disability as a result of injuries sustained at work on (date of injury). The claimant's position at the hearing was that he sustained back and neck injuries as a result of being knocked off his machine in a collision between his machine and Mr. V's forklift. The claimant's attorney said that "we are not here to determine anything about the confrontation between him and the stabbing. We are only here to show that he was operating a machine within the course and scope of his business in the place of business where he was working, and as a result of that collision between the two machines, he fell off of the machine and hurt his back and neck." The carrier's position at the hearing was that there was only one "event" which happened around Aisle 44, that the claimant was injured as a result of personal animosity between himself and Mr. V, that there was no "business reason" for the attack or the harassment, that the claimant was the aggressor in the fight, and that Mr. V cut the claimant to protect himself.

The hearing officer made the following pertinent findings of fact:

FINDINGS OF FACT

No. 3.Prior to (date of injury), there had been words spoken and contact at work between the claimant and his coworker, [Mr. V], that were not

in furtherance of the business or affairs of the employer and prompted their supervisor, [Mr. D], to instruct the claimant to stay away from [Mr. V].

No. 4.On (date of injury), the claimant sustained an injury after picking a fight, and actually fighting with, [Mr. V] at work.

No. 5.The fight between the claimant and [Mr. V] on (date of injury) was initiated by the claimant, and the claimant intended to harm [Mr. V].

No. 6.The fight between the claimant and [Mr. V] on (date of injury) was due to personal reasons, and had no connection to either man's employment at the employer.

The hearing officer concluded that the carrier raised sufficient evidence to put into issue its exemption from liability under Article 8308-3.02(2) and (4), and further concluded that the claimant had failed to show that his injuries were the result of anything other than his wilful intent and unlawful attempt to injure Mr. V or his personal animosity or hostility toward Mr. V that was unrelated to the employment. The hearing officer determined that the injury that the claimant sustained at work on (date of injury), was due to the claimant's wilful intent and unlawful attempt to injure another employee, as well as the claimant's personal animosity or hostility toward the employee that was unrelated to the employment, and, therefore, the carrier is relieved of any liability in connection with the claimant's claim.

A "compensable injury" means an injury that arises out of and in the course and scope of employment for which compensation is payable under the 1989 Act. Article 8308-1.03(10). The burden is on the claimant to establish that the injury occurred while he was engaged in or about the furtherance of his employer's business and that the injury was of a kind and character that had to do with and originated in the employer's business. Director, State Employees Workers' Compensation Division v. Bush, 667 S.W.2d 559 (Tex. App. - Dallas 1983, no writ). Article 8308-3.02 provides, in part, as follows: "An insurance carrier is not liable for compensation if: . . . (2) the injury was caused by the employee's wilful intention and attempt to injure himself or to unlawfully injure another person; . . . (4) the injury arose out of an act of a third person intended to injure the employee because of personal reasons and not directed at the employee as an employee or because of the employment." When sufficient evidence has been admitted to raise an issue that an exception to the carrier's liability applies, the law generally requires that the employee prove that the exception does not apply in showing that the injury arose out of and in the course and scope of employment. *See* Texas Workers' Compensation Commission Appeal No. 91070, decided December 19, 1991, and cases cited therein.

The question of whether an injury was sustained in the course and scope of

employment is ordinarily a question of fact. Orozco v. Texas General Indemnity Co., 611 S.W.2d 724 (Tex. App. - El Paso 1981, no writ). Under the 1989 Act, the hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e) and (g). As an interested witness, the claimant's testimony did no more than raise a fact issue to be decided by the hearing officer, and the hearing officer was not bound to accept the claimant's testimony at face value. Appeal No. 91070, *supra*. The hearing officer is privileged to believe all, part, or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App. - Amarillo 1977, writ, ref'd n.r.e.). Having reviewed the record, we conclude that there was sufficient evidence to raise the exceptions found in Article 8308-3.02(2) and (4); that the hearing officer was not required to believe the claimant's testimony that he sustained an injury at work just prior to his altercation with Mr. V; that the hearing officer's findings and conclusions are supported by sufficient evidence; and that the findings and conclusions are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See* Texas Indemnity Company v. Cheely, 232 S.W.2d 124 (Tex. Civ. App. - Amarillo 1950, writ ref'd); Federal Underwriters Exchange v. Samuel, 138 Tex. 444, 160 S.W.2d 61 (1942); Appeal No. 91070, *supra*. The hearing officer could reasonably conclude from the evidence that only one incident occurred between the claimant and Mr. V on July 26th, that being the fight somewhere around Aisle 44 or 48; that the fight was due to personal reasons not connected with the employment; that the claimant was the aggressor in the fight; that the claimant wilfully intended to unlawfully injure Mr. V; that Mr. V cut the claimant in an effort to protect himself against the claimant's assault; and that Mr. V's actions in the fight were due to personal reasons not connected with the employment.

The decision of the hearing officer is affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge